United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2156

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co., Inc. who are similarly situated,

Plaintiff-Appellant,

—against—

W. J. KANE, H. J. BERRY, R. M. BROWN, JR., W. CORBUS, D. K. DAVID, H. C. GILLESPIE, J. S. KROH, E. A. LE PAGE, R. F. LONGACRE, M. D. POTTS, J. M. SCHIFF, P. A. SMITH, H. TAYLOR, JR., E. J. TONER, W. I. WALSH, N. F. WHITTAKER, J. A. ZEIGLER (all of whom are officers and directors of Great Atlantic & Pacific Tea Co., Inc.), and GREAT ATLANTIC & PACIFIC TEA CO., INC., and C. G. BLUHDORN and GULF & WESTERN INDUSTRIES, INC., and KIDDER PEABODY & CO.,

Defendants-Appellees,

RACHEL C. CARPENTER,

Appellant.

BRIEF FOR APPELLANT CARPENTER

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BRIEF FOR APPELLANT CARPENTER

Statement of the Issues

The issues presented on this appeal by appellant Carpenter are:

1. Whether the district court erred in granting defendants' motions for summary judgment and denying plaintiff's cross-motion for summary judgment.

2. Whether the district court erred in holding that the order enjoining consummation of the tender offer was not the fault of the defendants.

3. Whether the order enjoining consummation of the tender offer relieved the defendants from liability to respond in damages.

4. Whether the district court erred in refusing to consider plaintiff's claims under the federal securities laws.

5. Whether the district court erred in holding that defendants had dealt fairly with plaintiff and the members of the class.

6. Whether the district court erred in finding that plaintiff and the members of the class suffered no damages cognizable at law.

Statement of the Case

This is a class action commenced by the plaintiff Lowenschuss, on behalf of all shareholders of Great Atlantic & Pacific Tea Co. ("A&P") who tendered their shares to Gulf & Western Industries, Inc. ("G&W") pursuant to an invitation by G&W for such tenders made on February 2, 1973 (10a). The action seeks to recover damages resulting from (1) breach of contract; and (2) violations of the Securities Exchange Act of 1934 ("the 1934 Act") (8a-16a).

The appellants, G&W, C. G. Bluhdorn and Kidder Peabody & Co., Inc., moved for summary judgment, and the plaintiff Lowenschuss cross-moved for summary judgment (18a, 66a, 68a, 70a). The district court granted defendants' motions for summary judgment, dismissed the complaint and denied Lowenschuss' cross-motion (83a-99a).

The opinion of Judge Duffy is reported at 356 F. Supp. 1066. The judgment appealed from dismissing the complaint was entered on May 10, 1974 (214a-216a) and by order of Judge Duffy became a final order and judgment as of August 10, 1974 (215a-216a).

Appellant Carpenter, a tendering shareholder of 1,957,012 shares of A&P stock has appeared herein and joins in the appeal pursuant to the order of Judge Duffy granting leave to do so (5a, 219a).

Statement of the Facts

On February 2, 1973, G&W made a public offer to purchase 3,750,000 shares of the common stock of A&P at a price of $20 per share. The offer was extended to all shareholders who properly tendered their shares on or before February 13, 1973 (unless extended by G&W), in accordance with the terms of the invitation to tender (17a1-17a6). The offer was thereafter extended by G&W from time to time until September 26, 1973, when G&W withdrew its offer (173a, 204a).

Carpenter duly tendered her shares prior to the original expiration date, pursuant to the terms of the tender offer.

The Prior Litigation Between G&W & A&P

On February 2, 1973, A&P publicly announced its opposition to G&W's tender offer. On February 5, 1973, G&W brought suit against A&P, alleging that A&P had made false and misleading statements in opposing the tender offer. (*Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co., Inc.*, 476 F. 2d 687, 690 (1973)). A&P filed an answer and counterclaim to G&W's action and moved for a preliminary injunction to restrain consumma-

tion of the tender off upon the ground that G&W had violated the federal securities and antitrust laws (476 F. 2d at 690).

In its counterclaim and on its motion for a preliminary injunction, A&P claimed that G&W had violated § 14(d) and 14(e) of the 1934 Act by failing to disclose: its intention to acquire dominance over A&P; that Bohack Corporation was the largest competitor of A&P and that C. G. Bluhdorn, as the largest stockholder and a director of Bohack, had effective control of Bohack; that there existed a consent decree between Bohack and the Federal Trade Commission; and that the areas in which G&W controls companies producing products which are actual or potential suppliers of A&P were not described (476 F. 2d at 691).

A&P's claim that the consummation of the tender would result in violation of the antitrust laws, was based on the claimed restriction of competition that would follow if Bluhdorn, in his dominant position with Bohack, also acquired control, or influence, over the business and affairs of A&P (476 F. 2d at 693-695).

On February 13, 1973, the district court granted A&P' motion for a temporary injunction and enjoined G&W and Bluhdorn from consummating the tender offer upon the ground that substantial questions existed with respect to the violations of law asserted by A&P. On March 12, 1973, this Court affirmed the injunction order (476 F. 2d 687).

In affirming the injunction order, this Court held:

> "Furthermore, with respect to all the antitrust claims, we are satisfied that the record demonstrates a substantial likelihood that G&W will seek to obtain control of A&P and that it has the potential to attain

> that goal. Our views in this regard are more fully set forth in our discussion of the securities law claims below. (476 F. 2d at 694).

With respect to the alleged fraud of G&W in failing to disclose its intention to acquire a controlling position in A&P, this Court held (476 F. 2d at 697):

> "* * * A&P has a probability of success in proving at trial that G&W had an intention to obtain control of A&P or to influence substantially its management, which intentions it failed to disclose in violation of § 14(e)."

This Court concluded its opinion with the recommendation that the district court "expedite further proceedings in this case, as it so commendably has done to date, with a view to the earliest possible date for trial on the merits consistent with the rights of the parties." (276 F. 2d at 699).

On September 26, 1973, A&P and G&W agreed to a discontinuance of the litigation and the withdrawal by G&W of its tender offer (173a, 204a). At that time, the price of A&P's shares on the New York Stock Exchange had declined substantially below $20 per share (54a, 76a, Wall St. J. Sept 26, 1973).

It is noteworthy that G&W's tender offer contained no "litigation out" provision *i.e.*, permitting it to withdraw from the tender in the event of actual or threatened litigation.

The Decision Below

In his decision granting defendant's motions for a summary judgment and denying Lowenschuss' cross-motion, Judge Duffy held that: "this case sounds only in contract"

(88a). He summarized the allegations of the complaint as follows (87a):

> "The present action sounds in contract. The complaint alleges that the G&W tender offer was an offer of a unilateral contract; that the offer was accepted by the plaintiff and members of the class by tendering A&P shares equal to or greater than the number of shares specified in the tender offer; that the contract was completed by the tender; that A&P, its officers and directors interfered with the contractual rights of the plaintiffs; and that defendants are obligated to pay to plaintiff and the other members of the class the tender offer price for their shares or, in the alternative, damages."

However, the very caption of the complaint discloses that the action is also based on violations of the 1933 Act and the 1934 Act (8a). The body of the complaint expressly alleges that "This court's jurisdiction of this action is based on the Securities Act of 1933, the Securities Exchange Act of 1934, the Rules and Regulations promulgated thereunder by the Securities and Exchange Commission." (9a). Paragraph 14(E) of the complaint paraphrases the language of §14(e) of the 1934 Act (11a).

The complaint seeks judgment against the defendants to recover all damages and losses suffered by plaintiff and plaintiff's class* (15a).

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* Although Judge Duffy questioned whether plaintiff had purchased his shares as an "investment" or "merely as a vehicle for this litigation in which counsel fees are sought" (98a), he inconsistently held that the action was properly brought as a class action and that "plaintiff will fairly and adequately represent the interests of the class of tendering shareholders" (89a). (See: *Cotchett* v. *Avis Rent A Car Systems, Inc.*, 56 F.R.D. 549, 554 [SDNY 1972]; *Kriger* v. *European Health Spa Inc.*, 56 F.R.D. 104 (E.D. Wis. 1972); *Graybeal* v. *American Savings and Loan Association*, 1973-1 CCH Trade Reporter Sec. 74, 469 [D.D.C. 1973]; *Taub* v. *Glickman*, CCH Fed. Sec. L.R. Sec. 92, 879 [SDNY]).

Judge Duffy based his decision relieving defendants of any liability on the ground that "In a very real sense there is in this case, in its present posture, no illegality or unlawfullness but rather impossibility." (94a). The "impossibility" to which Judge Duffy referred was the prior order in *Gulf & Western Industries, Inc.* v. *Great A & P Tea Co., Inc.*, affirmed by this Court (476 F. 2d 687) enjoining consummation of the tender offer.

Thus, Judge Duffy held that (94a):

> "The impossibility in this case rests on the finding of this Court, affirmed by the Court of Appeals, that issues raised by A&P, not G&W, are such that preliminarily this tender offer should not go through. If any party is going to be characterized as an efficient cause of the impossibility here, then A&P must bear that stamp, not G&W."

With respect to the antitrust violations with which G&W was charged, Judge Duffy held (93a):

> "The impossibility here, at least to the extent it is based on the antitrust violations, cannot be said to be caused by any particular party. If there be an antitrust violation here, it is the result of the juxtaposition of facts which were not intentionally incurred by defendants."

Judge Duffy also based his decision upon the ground that "as of the 5th of February (the date when G&W instituted its action against A&P), all shareholders of A&P can be held to be on notice of the pendency of the litigation regarding the propriety of the tender offer * * *." (95a). On this basis, Judge Duffy concluded that (95a):

> "Thus, even if this Court were of the persuasion that there was illegality here, it must be assumed

> that plaintiff was on notice of the facts comprising the impossibility, namely allegations of Antitrust and Securities Acts violations to an extent which would preclude his recovery."

Judge Duffy, conceding that "This point has not been briefed by either side" (96a), held that since the defendants had extended the offer three times with permission to plaintiffs and the class to withdraw any shares tendered, that plaintiff and the class "have not been deprived of the use of their shares." (96a).

In conclusion, Judge Duffy ruled that those making a tender offer

> "* * * have a duty of dealing fairly with the persons making the tender. There is no evidence that the defendants have done anything other than deal fairly with plaintiff and the class he represents. However, since plaintiff and the class he represents have suffered no damage cognizable at law, the complaint must be dismissed." (97a).

ARGUMENT

POINT I

The District Court erred in denying plaintiff's motion for summary judgment and in granting defendants' motions for judgment.

Plaintiff's Motion for Summary Judgment

It is undisputed that on February 2, 1973, G&W made an unconditional offer to the shareholders of A&P to purchase 3,750,000 shares of A&P common stock at $20 per share; and that shareholders of A&P, including the appel-

lants, complied with the terms of that offer. It is also beyond dispute that G&W failed to complete its offer by acquiring the tendered shares and paying the tender price.

Ordinarily, an unconditional offer and an unconditional acceptance of the offer on the terms proposed, would constitute a binding contract, entitling the offeree to damages upon breach of the agreement (*N.Y. Juris. Vol. 9 Contracts* §§ 25, 29). The federal securities laws secure that right to shareholders under state law, as well as under federal law.

Section 28(a) of the 1934 Act, 15 U.S.C. §78bb, provides in part that:

> "The rights and remedies provided by this chapter shall be in addition to any and all rights and remedies that may exist at law and in equity, * * *."

Accordingly, every right that the tendering shareholders of A&P have under both federal and state law is reserved to them by this section. Upon the undisputed facts of this case, G&W is liable, as a matter of both state and federal law, for all damages sustained by A&P's tendering shareholders as a result of its breach of the tender contract.

The sole defense advanced by G&W is that performance of its bargain was rendered "impossible" by the order enjoining the consummation of the tender offer. We maintain that this defense is insufficient as a matter of law.

The "impossibility" on which G&W relies as a defense was clearly of its own making. As we shall demonstrate, such "impossibility" of performance constitutes no defense.

In *Gulf & Western Indus. Inc.* v. *Great A & P Tea Co., Inc.*, 476 F. 2d 687 (1973), this Court sustained the injunction order upon the ground of A&P's "likelihood of success"

in establishing that G&W had concealed its "intention to obtain control of A&P or to influence substantially its management"; and that such control by G&W of A&P, in view of Bluhdorn's dominant position in Bohack, A&P's principal competitor in the metropolitan area, would probably have constituted a violation of the antitrust laws.

It is clear beyond debate that it was G&W's willful and wrongful conduct which required the court to grant the injunction order. The decision below, however, glosses over the central fact that the injunction order was predicated entirely on the manifestly wrongful conduct of G&W and Bluhdorn.

Thus, with respect to the antitrust violation, the district court held that the "impossibility" of performance was not due to any fault on G&W's part, but rather "it is the result of the juxtaposition of facts which were not intentionally incurred by defendants." (93a). Whatever this euphemistic language may mean, it cannot obfuscate the fact that G&W and Bluhdorn intended, as this Court held, to acquire control of A&P, a fact which they deliberately concealed and which was one of the prime grounds for granting the injunction order.

Again, the district court gave no consideration to the fact that such concealment by G&W and Bluhdorn (as well as the concealment of other material facts), constituted a willful violation of § 14(e) of the 1934 Act. Thus, the district court held merely "that issues raised by A&P, not G&W, are such that preliminarly this tender offer should not go through." (94a). Here again, the district court ignored the nature of the "issues raised by A&P" i.e., the fraudulent concealment by G&W and Bluhdorn of material facts in violation of § 14(e).

G&W and Bluhdorn cannot now be heard to use the injunction order, based on their own misconduct, as a pretext to avoid a bad bargain. "A right cannot spring from a wrong." (*Ballantine Law Dictionary* [English Trans.] p. 712).

> "The rule that performance is excused where it is forbidden by judicial order does not apply where the fault of the party owing the performance contributed to the order, as where his fraud was its basis." (*N.Y. Juris. Vol. 10, Contracts* § 373, at p. 362).

In *Peckham* v. *Industrial Securities Co.*, 31 Del. 200, 113 A. 799 (Sup. Ct. Del. [1921]) the court held at p. 801:

> "And there is also uniformity in this: that where the injunction or other judicial interference is caused by the fault of the defendant it will not excuse the performance of his contract."

Corbin on Contracts, Vol. 6 § 1346 states the applicable law as follows:

> "Performance of a contract is sometimes prevented by a judicial order or decree forbidding such performance or by a judicial seizure of subject matter or of the means necessary to performance. Some cases have held that this kind of prevention is not a good excuse for non-performance. These holdings can be justified if the judicial action was brought about by reason of the defendant's default in performance of some other legal duty, or if the defendant could have prevented such judicial action by diligent effort. The defendant owed a duty to the plain-

> tiff to perform his contract; and this includes the duty of taking all steps that are necessary to such performance, even including the prevention of interference by third parties so far as is possible by a reasonable degree of effort."

Not only was the injunction order affirmed by this Court on the basis of G&W's misconduct, but G&W and Bluhdorn did nothing whatever to seek to vacate the injunction by correcting the conditions which caused it. Had Bluhdorn promptly sold all of his Bohack stock, resigned from Bohack's board of directors together with his associates and had he disclosed his intention to seek control of A&P, there would have been no basis to enjoin the acquisition of A&P stock through consummation of the tender. It is no defense to non-performance of the agreement that the steps necessary to correct the unlawful condition created by G&W and Bluhdorn were burdensome and expensive. (*N.Y. Juris. Vol. 10 Contracts* § 356 at p. 339).

It will be recalled that the tender offer here omitted the usual provision relieving the offeror from liability in the event of actual or threatened litigation. It is settled law that impossibility of performance is no defense where the promissor could have foreseen and provided against that contingency.

As stated in *N.Y. Juris. Vol. 10, Contracts* § 356:

> "Impossibility of performance is, in general, no answer to an action for damages for nonperformance of a contract, provided the contingency was such as the promissor should have foreseen and provided against." (citing *Vandergrift* v. *Cowles Engineering Co.*, 161 N.Y. 435 [1900]).

The rule was also stated in *Frenchman & Sweet* v. *Philco Discount*, 21 A D 2d 180, 182 (App. Div. 4th Dept. 1964) as follows:

> "Frustration of performance is no defense where no unusual or unforeseeable event prevented performance and where provision could have readily been made for what actually occurred (6 Corbin, Contracts, §1329, p. 346 et seq.; §1340, p. 404 et seq.)."

In *Wheeler* v. *Connecticut Mut. Life Ins. Co.*, 82 N.Y. 343 (1880) at p. 550 the court stated:

> "While, as a general rule, where the performance of a duty created by law is prevented by inevitable accident, without the fault of a party, the default will be excused, yet when a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control, will excuse him, for the reason that he might have provided against them by his contract. (*Dexter* v. *Norton*, 47 N.Y. 62; *Harmony* v. *Bingham*, 12 id. 99 [*551 107; *Tompkins* v. *Dudley*, 25 id. 275.)"

Accord:

Dexter v. *Norton, et al.*, 47 N.Y. 62, 64 (1871);
Tompkins v. *Dudley, et al.*, 25 N.Y. 272, 274 (1862);
Bayview Gen. Hosp. v. *Assoc. Hosp. Serv.*, 45 Misc. 2d 218, 220 (Sup. Ct. N.Y. Co. 1964);
N.Y. Law of Contracts Vol. 2 § 793 at p. 1509;
Foster v. *Atlantic Refining Company*, 329 F. 2d 485, 489 (5th Cir. 1964).

We submit that G&W's omission to include in its tender offer a "litigation out" provision was no mere oversight on its part. G&W is unquestionably well versed in tender offers and other methods of acquiring control of target companies. As this Court noted (476 F. 2d at 696): "G&W has a well established practice of eventually acquiring firms in which it initially purchased only a small percentage of the outstanding shares."

G&W must have been aware that a tender offer of this magnitude might well arouse serious opposition from A&P's management and might well lead to litigation. G&W's omission to include a "litigation out" provision in its tender offer was clearly intended as an inducement and implied representation to A&P shareholders that litigation would not be used as a pretext to withdraw from the tender.

Having elected not to seek the protection of a "litigation out" provision and having unconditionally offered to pay $20 per share for properly tendered shares, G&W should not now be relieved from its absolute commitment, without recompense to those who have been damaged. It would, we submit, be particularly inequitable to permit G&W to profit from its own wrongdoing by withdrawing its promise to pay $20 per share when the market price of those shares is substantially below the tender price.

One wonders what G&W's position would have been if the price of the shares of A&P had advanced, instead of declining drastically. In such circumstance, it is more than likely that Bluhdorn would have sought to reap a profit by selling his Bohack shares and taking any other action necessary to eliminate the anti-trust issue. It is, we believe, contrary to the spirit of the securities laws, the common law and common sense that a wrongdoer should be permitted to occupy this "heads I win, tails you lose" position.

* * * * *

In the Court below, G&W strenuously urged that the tender contract was not "illegal", but that performance had been rendered "impossible" by the order enjoining consummation of the tender. This Court disagreed with the contention and held that the tender offer was made in violation of § 14(e) and that consummation of the tender would in all likelihood violate the antitrust laws.

Whether the agreement be deemed illegal, or legal but "impossible" of performance, it is clear that the parties were not in *pari delicto*. G&W and Bluhdorn were fully aware of all of the facts on which the injunction order was predicated. The shareholders of A&P were obviously not in the same position.

Under these circumstances, even assuming the illegality of the tender contract, the tendering shareholders would have a right of recovery. As stated in *Furlong* v. *Johnson, No. 1*, 209 App. Div. 198, 204 (4th Dept. 1924):

> "Where the parties are in equal fault in the violation of law or a rule of public policy, the law will deny relief to either one seeking it. (*Saratoga County Bank* v. *King*, 44 N.Y. 87). Not so, however, where the one seeking the remedy is not the wrongdoer, and the denial of relief would benefit the guilty party at the expense of the innocent. (*Tracy* v. *Talmage*, 14 N.Y. 162; *Irwin* v. *Curie*, 171 id. 409)."

In *Judson* v. *Buckley*, 130 F. 2d 174, 180, (2d Cir. 1942) Cert. Den. 317 U.S. 679, 87 L ed 2d 545, the court held:

> "Numerous authorities support the view that a suit for recovery is not barred in cases where: (a) the parties, because of their relationship and conduct are not in pari delicto, *Ford* v. *Harrington*, 16 N.Y.

> 285; *Tracy* v. *Talmadge*, 14 N.Y. 162, 67 Am.Dec. 132; *Norton* v. *Blinn*, 39 Ohio St. 145, 149; *Place* v. *Hayward*, 117 N.Y. 487, 23 N.E. 25; 6 Williston, Contracts, Rev.Ed., § 1789.**"

In *A.C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 85 L. ed. 500, 312 U.S. 38 (1940), the Supreme Court noted the public importance of applying this principle to cases involving violations of the federal securities laws. In that case, the plaintiff had obtained an option to purchase shares of stock. The defendant declined to honor the option and the plaintiff sued to recover damages. The defense was that the shares were unregistered in violation of the 1933 Act. The Supreme Court of Idaho sustained the defendant's position. In reversing, the Supreme Court held (at 85 L ed p. 505):

> "Here the clear legislative purpose was protection of innocent purchasers of securities. They are given definite remedies inconsistent with the idea that every contract having relation to sales of unregistered shares is absolutely void; and to accept the conclusion reached by the Supreme Court below would probably seriously hinder rather than aid the real purpose of the statute."

See also:

> 12 *Am. Jur., Contracts*, § *217;*
> *Irwin* v. *Curie*, 171 N.Y. 409, 412 (1902);
> *Mills* v. *Electric Autolite Company*, 396 U.S. 375, 386 (1970):

* * * * *

The district court held: "that this case sounds only in contract" (88a). On this basis, it declined to consider the

liability of defendants for violation of the federal securities laws and relegated plaintiff to a separate suit filed by him based on alleged violation of the securities laws (88a). We submit that it was error for the district court to refuse to consider the liability of defendants under the federal securities laws. In the first place, as noted above (*supra*, p. 6), the complaint in the instant action both in the caption and in the body made it plain that liability is sought to be imposed for violations of the federal securities laws. In the second place, under the liberal rules of notice pleading applicable in the federal courts, the district court should not have rejected consideration of defendants' liability under federal law.

In any event, if this Court holds that G&W's tender offer and the appellant's acceptance thereof constituted a binding agreement, whether liability for damages is imposed for breach of contract, or for violation of federal law, is altogether immaterial. We submit that the inartistic form of the pleading here is not a proper ground for the denial of relief.

* * * * *

The holding by the district court (95a) that the tendering shareholders of A&P were precluded from recovery because they were "on notice of the facts comprising the impossibility" from February 5, 1973, when G&W commenced its action against A&P, would also negate the salutary purpose of the securities laws, i.e., to protect innocent purchasers of securities. It would hardly be consistent with the purpose of the legislation to hold that shareholders are put on notice of all pleadings filed in any federal district court, as well as the contents of all newspaper items. In any case, had any shareholder of A&P been aware of these circumstances, all that he could possibly have known

was, not the facts, but the conflicting claims of the contending parties.

* * * * *

We are altogether at a loss to understand the district court's statement *sua sponte*, that (96a):

> "There is moreover, serious question as to the issue of what, if any, damages the plaintiff and the class he represents have sustained. This point has not been briefed by either side. But I seriously question what, if anything, could be assessed as damages."

It needs no argument to establish that one who has an unconditional agreement to pay him $20 per share for stock selling in the open market at substantially below that price, suffers damage when the contract is breached.

By the same token, the district court's statement that A&P's tendering shareholders could not recover because they were never "deprived" of the use of their shares" (96a) does not hold water. The undisputed fact of the matter is that by the very terms of the tender offer, the right to withdraw was limited to "at any time prior to the close of business on February 9, 1973." (17a-1). Thereafter, the shareholders could withdraw their shares after April 3, 1974, if such shares had not previously been purchased by G&W (17a-1). Thus, the tendering shareholders were, at the very least, deprived of the use of their shares from February 9 to April 3, 1973.

In any case, we do not understand the materiality of the statement that shareholders were not "deprived" of their shares. Since the price of the A&P shares never reached the offering price of $20, it was hardly to be expected that

the A&P shareholders would take advantage of their "right" to withdraw their shares.

* * * * *

The district court, holding that those making a tender offer "have a duty of dealing fairly with the persons making the tender" concluded that there was "no evidence that the defendants have done anything other than deal fairly with the plaintiff and the class he represents." (97a). How the district court could have reached this conclusion in the face of the finding of this Court that there was strong evidence that G&W and Bluhdorn were guilty of willful and fraudulent violation of §14(e) is difficult to understand. The very basis of this Court's affirmance of the injunction order was the fact that G&W and Bluhdorn had dealt *unfairly* with the shareholders of A&P.

* * * * *

The judgment below, if affirmed by this Court, would leave the shareholders of A&P without remedy, notwithstanding the clear violation by G&W of §14(e). To hold under such circumstances that shareholders who have been injured by defendants' violation of law are without remedy, would enable a wrongdoer to violate those laws with impunity and would seriously impair the effectiveness of the enforcement of those laws.

As the Supreme Court held in *J. I. Case Co.* v. *Borak*, 12 L. ed. 2d, 423 (1964), 377 U.S. 426 §84 S. Ct. 1555 (12 L ed at 428):

> "As in anti-trust treble damage litigation the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements."

The above language is obviously as applicable to § 14(e) of the 1934 Act, relating to fraudulent tenders, as it is to §14(d) relating to fraudulent proxy statements.

In *J. I. Case, supra*, the Court quoted with approval from the opinion in *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 85 L. ed. 189, 61 S. Ct. 229 (1940) as follows:

> "The power to *enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." (85 L. ed. at 194). (Emphasis the Court's.)

It is clear that both Congress and the courts intend that a violation of the securities laws should not be permitted without affording those injured thereby a suitable remedy.

Defendant's papers in opposition to plaintiff's motion for summary judgment are devoid of any proof to establish that they were not guilty of fraud or other misconduct. Accordingly, we submit that on the undisputed facts of this case, G&W has no defense as a matter of law and plaintiff's motion for judgment should have been granted.

Defendants' Motion for Judgment

In any event, defendants' motions for judgment should have been denied upon the ground that with respect to *those* motions there are genuine issues of fact which can be determined only upon trial.

In support of their motion for summary judgment, G&W and Bluhdorn have come forward with no facts to establish that they are free from fraud, or other misconduct, in promulgating their tender offer. In the absence of such

proof, it was clear error to grant their motion for summary judgment.

The factual issues relating to the defendants' defense of "impossibility" of performance (assuming the defense sufficient in law), will include proof of all material facts relating to (a) G&W's intention to acquire dominance over A&P; (b) the existence of a consent decree between Bohack and the Federal Trade Commission; (c) G&W's failure to describe the areas in which it controls companies producing products which are actual or potential suppliers of A&P; and (d) whether G&W had reason to believe that its acquisition of shares of A&P would violate the antitrust laws.

All of these issues involve questions of fact which can only be determined after trial on the merits. Accordingly, on the assumption that plaintiff and the class are not entitled to judgment as a matter of law, the defendants' motions should likewise have been denied upon the ground that determination thereof involves subtantial questions of fact.

As the court stated in *Harwell* v. *Growth Programs, Inc.*, 451 F. 2d 240 (5th Cir. 1971) Cert. Den. 409 U.S. 876, 34 L ed 2d 129 in reversing an order granting summary judgment dismissing a complaint (at p. 245):

> "It is generally conceded that Growth breached its contracts with the plaintiffs. After an examination of all of the facts, the court can determine whether Growth might be liable for damages, even if the court should determine that the contracts cannot be specifically enforced. The parties to a contract rendered impossible to perform by government regulation are not always excluded from the exposure to liability. The NASD Interpretation does not make the contract illegal but only makes it improper for the NASD members to be involved with it. There is a distinction between a literal impossibility of performance and mere economic inadvisability.

> See Haby v. Stanolind Oil and Gas Co., 228 F.2d 298 (5th Cir.). The representations Growth made on the sale of the contracts to plaintiffs, the extent to which Growth was involved in the administrative process, the extent to which it could have preserved the possibility of performance, the extent to which it encouraged the plaintiffs' so-called "abuse" of the 'in-and-out' privilege are all facts which must first be determined before a decision can be made as to whether any remedy is available to plaintiffs for the admitted breach of their contracts."

The district court, we submit, committed error in granting defendants' motions for summary judgment in view of the questions of fact raised by their motions.

CONCLUSION

The Court below referred to the "unsettling irony" in that plaintiff seeks damages for breach of contract and at the same time tenders his shares in hopes of performance of that contract (96a). The real "unsettling irony" of this case is that, the injunction decree of the court, intended to protect A&P and the public against the fraud of G&W and Bluhdorn, is now being used to shield the wrongdoers from liability.

The order and judgment of the Court below denying plaintiff's motion for judgment and granting defendants' motions for judgment dismissing the complaint should be reversed and plaintiff's motion for judgment should be granted and defendants' motions for judgment should be denied.

Respectfully submitted,

MILTON PAULSON

Attorney for
Appellant Carpenter

ADDENDUM

Statutes and Rules

Securities and Exchange Act of 1934

Sec. 14(e): It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Sec. 28(a): Effect on existing law.

> (a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; * * *

Service of three (3) copies of the within
brief is hereby admitted
this 8th day of November, 1974

Sullivan & Cromwell
Attorney(s) for Kidder, Peabody & Co

Service of three (3) copies of the within KED 11-15 ans
Brief is hereby admitted
this 8th day of November, 1974

Simpson Thacher & Bartlett
Attorney(s) for Gulf & Western
and Charles Bludhorn

Service of three (3) copies of the within
matter is hereby admitted
this 8 day of November 1974

Abram E Freedman
Attorney(s) for Investcorp